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Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

No. 96-194

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ROBOSERVE, INC.,
Petitioner,

v.

KATO KAGAKU CO., LTD.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

4 pp

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In the petition, we showed that certiorari should be granted for three principal reasons. (i) The courts of appeals take dramatically different approaches to the question of when to certify an issue of state law to state courts. (ii) The Seventh Circuit's approach is far more restrictive than that of several other circuits, notably the Second and the Eleventh Circuits, which would not have done what the panel majority did in this case. (iii) There is an increasing tendency among federal courts, nationwide, to do what the panel majority did here: to resolve cutting-edge questions of state law on the basis of their own conceptions instead of following state law, as *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), requires.

The brief in opposition conspicuously refrains from taking issue with *any* of these points. Respondent makes no effort at all to explain away the conflict we demonstrated between the Seventh Circuit and the Second and Eleventh Circuits. Nor does respondent deny that the Seventh Circuit's approach to certification is much more restrictive than those other circuits'. Indeed, respondent confirms the extent to which the courts of appeals are in disarray on this issue, by asserting (albeit solely on the basis of a law review article) that the Fourth and Fifth Circuits follow an approach more like the Seventh Circuit's. See Br. in Op. 11. Finally, respondent does not make even the slightest effort to deny that there is an increasing nationwide problem of federal courts' taking the initiative in developing important state law doctrines according to their own views instead of deferring to the state courts.

The only reason respondent offers for denyng certiorari is that in this case, the panel majority "applied settled Illinois law" (Br. in Op. 9). Judge Ripple's dissenting opinion alone shows why this is not remotely the case. The panel majority explicitly held that in an action for fraud, punitive damages will not be available unless the plaintiff shows that the defendant intended to injure it: "[W]e hold that a plaintiff seeking punitive damages under these circumstances must at least put forth some evidence of an intent to injure" (Pet. App. 16a). Neither the panel majority nor respondent is able to cite a single Illinois case that stands for this striking proposition, and as we showed in the petition (Pet. 9-11) there are many cases that are irreconcilable with it. Whatever might be said about the ultimate correctness under Illinois law of the panel majority's holding on the punitive damages issue—and we believe it was plainly wrong—the notion that the panel majority's decision represents an unproblematic application of Illinois law cannot possibly be sustained.

As we explained in the petition, it has been a generation since the Court last addressed the important issue of when federal courts in diversity cases should certify questions to state courts (see *Lehman Bros. v. Schein*, 416 U.S. 386 (1974)), and there have been many significant developments in that time. See Pet. 6-8, 11-12.[1] Respondent does not appear to disagree with us about either the importance of the issue or the significance of those developments. Review is therefore appropriate in this case.

CONCLUSION

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1996

[1] Respondent suggests (Br. in Op. 11) that certification should not be allowed at the behest of the party who brought suit in federal court. This notion is unsupported by anything in this Court's decisions, and it is flawed for a variety of reasons: there is simply no basis for saying that once a party invokes its statutory right to the diversity jurisdiction of the federal courts, that party somehow assumes the risk that those courts will not carry out their responsibilities under *Erie Railroad v. Tompkins*, *supra*. But the mere fact that respondent must resort to such a novel and far-reaching proposition in order to answer our arguments is further evidence that the question presented by this case is substantial and important.